## BRIEF IN SUPPORT OF PETITION.

### POINT I.

THE JONES ACT DOES NOT APPLY TO MEMBERS OF THE CREW EMPLOYED BY ALIEN SHIPOWNERS WHOSE SHIPS ARE REGISTERED ABROAD.

The foregoing is true irrespective of whether the crew member is a citizen of the United States; whether he is an alien resident in the United States; whether he signed articles in the United States; whether the voyage commences here or ends here; and whether the accident happened in territorial waters of the United States.

This court has noticed on two occasions the problem of the application of the Jones Act to alien crew members and alien vessels.

In *Plamals* v. *Pinar Del Rio,* 277 U. S. 151 (1928) a member of the crew of a British vessel sued *in rem* under the Jones Act for an injury occurring to him while the vessel lay in the territorial waters of the United States. The lower court held that the crew members' rights were governed exclusively by British law. This court held that the Jones Act did not grant any right *in rem* even as against an American vessel. With respect to the present question this court said, at page 155:

> "We agree with the view of the Circuit Court of Appeals and find it unnecessary now to consider whether the provisions of Section 33 are applicable where a foreign seaman employed on a foreign ship suffers injuries while in American waters."

In *Uravic Adm'x* v. *F. Jarka Company Inc., et al.,* 282 U. S. 234 (1931) this court held that an American citizen

working as a longshoreman for an American stevedoring corporation, who had been injured in the harbor of New York on board a German vessel was entitled to the benefits of the Jones Act. On the other hand, with respect to members of the crew the court said, page 241:

> "If it should appear that by valid contract or special circumstances seamen on a foreign ship should not be protected by the statute it will be time enough to consider the exception when it is presented. But the purport of the words is plain and there is no reason to deny stevedores the benefit of them even if exceptions to the rule for seamen may be found upon peculiar facts."

In the course of its opinion in that case this court referred to the longshoremen whose legal rights were being defined as "American citizens", "those who work in our harbors", "American workmen", and "Americans momentarily on board a private German ship in New York." Nowhere in the opinion did the court refer to such longshoremen as "American seamen". Instead, the court said that such longshoremen had the rights of "American seamen".

Furthermore, this court did not use any of the foregoing appellations with respect to the members of the crew of the vessel involved in that case. Instead, wherever such crew members were referred to by the court, the expression used was "seamen on a foreign vessel", "seamen on a foreign ship", and "seamen upon a German vessel". Obviously, such seamen members of the crew were all in the same category so far as the law applicable to them was concerned, and there was nothing in the mind of the court concerning any distinction among members of the crew based either on their citizenship, their place of residence, or the country where they were when they happened to join the foreign vessel.

Nevertheless, shortly after the rendition of the Uravic opinion, some lower courts seized upon the expression which this court had used with respect to longshoremen, viz.: that such "American citizens" have the rights of "American seamen", and used this expression as a sort of mechanical pointer by which one could determine whether a crew member employed by an alien on an alien vessel was entitled to the benefits of the Jones Act.

Among these cases was *Shorter* v. *Bermuda & West Indies S. S. Company, Ltd.*, 57 F. (2d) 313, where the Jones Act was held applicable to a member of a crew of a foreign vessel owned by an alien, who had signed articles in an American port and was injured in an American port. The court stressed the fact that the seaman was an American citizen and, therefore, an "American seaman".

Thereafter, a contrary result was reached in the case of an alien seaman who had signed articles abroad but was injured in an American port on board a foreign vessel owned by an alien. He was not an "American seaman". *Buda* v. *S.S. Magdapur & T. & J. Brocklebank, Ltd.*, 3 Fed. Supp. 971.

A similar ruling was made by the United States Circuit Court of Appeals for the Second Circuit in *The Paula*, 91 F. (2d) 1001, cert. den., 302 U. S. 750.

However, in the case of *Hogan* v. *Hamburg American Line*, 152 Misc. (N. Y.) 405 (1935), the state court refused to apply the Jones Act to an alien resident of the United States who was just as much or just as little an American seaman as the respondent here. He had signed articles on a German vessel while in the United States for a trip to foreign ports and return to the United States but was injured on the high seas. Hogan, like the seaman in the case at bar, had declared his intention to become a citizen

of the United States and had resided here for over fifteen years. This court denied certiorari, 295 U. S. 749.

In the case at bar, the Circuit Court of Appeals, without noticing the distinction between a longshoreman and a member of the crew, lost sight of the caveat which this court had announced in the *Uravic* case with respect to members of the crew.

With respect to longshoremen this court in the *Uravic* case had adopted the exclusive test of territoriality. However, in a number of places in that opinion this court gave warning that territoriality was not, necessarily, the test to be applied in the case of a member of the crew. It spoke of instances "* * * when for some special occasion this country adopts a foreign law as its own". It mentioned "valid contract", and "special circumstances", and exceptions to the territorial rule "for seamen * * * upon peculiar facts". The whole question was specifically left open for future decision by this court, but the Circuit Court of Appeals proceeded on the theory that the *Uravic* case decided the question.

It can hardly be doubted that what was in the mind of the Supreme Court in using such language with respect to a member of the crew was the doctrine of comity, made necessary by the international aspects of the seamen's profession. In both the *Uravic* and the *Plamals* cases, the court's attention had been called to numerous decisions announcing the rule that a seaman who signs on a foreign vessel, regardless of the port where his contract is signed, becomes for purposes of his relationship with the vessel and his employer, a citizen or subject of the nation whose flag the vessel flies, and that the laws of such vessel follow it around the world and even into the ports of nations foreign to the flag.

This doctrine was announced in *In re Ross*, 140 U. S. 453. Lower courts have applied the doctrine to suits by

crew members to recover against their shipowners for torts. In *Rainey* v. *N. Y. & P. S. S. Co.,* 216 Fed. 449 (1914), the Circuit Court of Appeals for the 9th Circuit said, page 454:

> "* * * When Rainey, although a citizen of the state of Washington, went before the British consul at Seattle and signed the shipping articles, and thereupon stepped upon the British ship flying the British flag as a member of its crew, as the record shows he did, he stepped upon British territory and became entitled to the protection and benefit of all British law in behalf of British seamen, and subject to all of its obligations and liabilities."

Rainey was employed by an American corporation which had chartered a British vessel on a demise or bare boat basis and the accident to Rainey had occurred while the vessel was lying in a Peruvian harbor.

It was because of this well settled doctrine that the New York courts denied relief under the Jones Act to an "American seaman" who had joined a British vessel as a member of the crew while it lay in the harbor of New York and who was injured before the vessel departed from New York. *Clark* v. *Montezuma,* 217 A. D. (N. Y.) 176. In that case the crew member had not signed articles but the court treated him as a member of the crew, which he was.

In *Resigno* v. *F. Jarka Co. Inc.,* 248 N. Y. 225, at 241, the New York Court of Appeals said, per Judge Crane, with respect to Clark, "He ceased for the time being to be an American seaman".

In *Plamals* v. *Pinar del Rio,* 16 F. 2d 984, the Circuit Court of Appeals said:

> "That libelant is a Spaniard is immaterial, the case is the same as if he had been an Englishman

> (The Hanna Nielsen, C. C. A. 273 Fed. 171, citing the Belgenland, 114 U. S. 355)."

In *The Belgenland,* this court said, at page 367:

> "* * * whoever engages voluntarily to serve on board a foreign ship necessarily undertakes to be bound by the law of the country to which such ship belongs, * * *."

The rule that our courts will not apply our law to aliens who are temporarily here as crew members on foreign vessels is an outstanding exception to the general rule of territoriality as applied in the *Uravic* case in the case of longshoremen. It was there recognized as a possible exception.

A pertinent illustration of the application of the general rule of territoriality is to be found in the case of *New York Central Railroad* v. *Chisholm,* 268 U. S. 29. There the crew of a train, subject to the Federal Employers' Liability Act, were hired in the United States by an American corporation and in the course of their employment ran the train into Canada. While it was in Canada, Chisholm, an employee, was killed. His widow tried to recover under the Federal Employers' Liability Act, but this court held that the statute had no extra territorial effect.

The Circuit Court of Appeals for the Sixth Circuit has recognized that the *Chisholm* decision has no application to members of the crews of vessels. They, as already stated, fall within the exception to the rule. *Grand Trunk Ry.* v. *Wright,* 21 F. (2d) 814 (1927). Affirmed on other grounds, 278 U. S. 577.

The doctrine that the law of the ship's flag applies all over the world and in foreign ports, has been adopted by our courts with respect to injuries to seamen on American

vessels while lying in foreign harbors. In *Alpha Steamship Corp.* v. *Cain*, 281 U. S. 642, the Jones Act was applied to an injury received by a seaman on an American vessel while it was tied to a dock in a Venezuelan port.

In *Grace Line, Inc.* v. *Toulon*, 237 A. D. 982; 262 N. Y. 506, the Jones Act was applied to a crew member of an American vessel who was injured while he was temporarily upon a Peruvian lighter lying in a Peruvian port. The American employer in that case petitioned this court for certiorari on the express ground that the territoriality rule announced in the *Chisholm* case should be applied to a seaman and should defeat application of the Jones Act. This court denied certiorari, 290 U. S. 668.

That this rule is a reciprocal one and applies as well to foreign vessels while in our harbors as it does to our vessels while in foreign harbors has been recognized by the lower courts. *Clark* v. *Montezuma Transportation Company, Ltd.*, 217 A. D. 172; *Wenzler* v. *Robin Line S.S. Company*, 277 Fed. 812, *Plamals* v. *Pinar Del Rio*, District Court opinion, not reported, but to be found in transcript of record filed in the Supreme Court, October, 1927 Term, No. 225, at page 81, *et seq.*

In *Bennett* v. *Connolly*, 122 Misc. (N. Y.) 149, affirmed 208 A. D. 852, the court said at page 150:

> "I shall follow the rule stated by U. S. District Judge Cushman in *Wenzler* v. *Robin Line S.S. Co.*, 277 Fed. Rep. 812. It seems to me that the conclusion there reached is based upon reason and justice. It means that as long as the seaman is aboard his vessel the obligations of the owner to him as to torts are measured by one law—the law of the flag."

In *U. S. Shipping Board Emergency Fleet Corporation, et al.* v. *Greenwald*, 16 F. (2d) 948, the Circuit Court of Appeals for the Second Circuit said, page 951:

> "Jurisdiction and the laws of the nation accompany the ship, not only over the high seas, but also in the ports and harbors, and everywhere else they may be water-borne. United States *v.* Rodgers, 150 U. S. 249."

The doctrine has its basis not only in comity but also in necessity as well. It is, indeed, a vital doctrine to two nations situated as are the United States and Canada on either side of the Great Lakes and smaller tributary waters. The Circuit Court of Appeals for the Sixth Circuit in *Thompson Towing & Wrecking Association* v. *McGregor*, 207 Fed. 209 (1913), rejected the doctrine of territoriality as determining the law applicable to a death occurring upon an American vessel while lying in Canadian waters. It adopted, instead, the exception to the rule which is here advocated, and applied the law of the State of Michigan where the vessel was owned. Any other doctrine was declared to be unworkable. The court said at page 219:

> "* * * It is manifest that such a constructive extension of territorial sovereignty as to matters occurring on board a ship domiciled and situated as the Stewart was, and not involving the peace, dignity, or tranquillity of the nation in whose waters she was lying, rests upon the necessities, not to say the comity, of nations whose conventional boundaries adjoin in navigable waters. This is well illustrated by a portion of the opinion below:
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> 'If the proper conclusion in this case was doubtful, I should hesitate to decide that the existence of this liability depended upon a few minutes of time or a few feet of distance, as would be the case with a vessel situated nearly upon the line and frequently crossing and recrossing; or that upon this subject there could be one rule upon the Stewart and another rule upon the Merrick; or that there might be one rule forward and another aft, on the same boat'."

It was because of this situation that the same Circuit Court in *Grand Trunk Ry.* v. *Wright,* 21 F. 2d 814, refused to apply the Jones Act to a member of the crew injured in American territorial waters on board a vessel owned by an American corporation but which was "owned" under demise or bareboat charter by the seamen's employer, a Canadian corporation.

In the *Uravic* case, this court found no reason for rejecting the general rule of territoriality in the case of a longshoreman. However, the court expressly noted a difference between the case of a longshoreman and a member of the crew. The "special circumstances" which it there mentioned undoubtedly had reference to the foregoing doctrine.

Although the words of the Jones Act are general, there is nothing in its language, or elsewhere among the statutes of the United States, which compels an application of the Jones Act in the case of alien seamen injured on foreign vessels owned by aliens. The farthest the Congress has gone, according to the holdings in several cases, is to require the application of the Jones Act in the case of injuries to seamen employed by American citizens on vessels registered in foreign countries. This result is reached by a debatable construction of 46 U. S. Code, Section 713 and is illustrated by such cases as *Gerradin* v. *United Fruit Co.,* 60 F. 2d 927 C. C. A. second, cert. den., 287 U. S. 642, and *Torgerson* v. *Hutton,* 243 A. D. 31 affirmed 267 N. Y. 535, cert. den., 296, U. S. 602. Those cases are wholly unrelated to the problem here presented.

*Cunard Steamship Company* v. *Mellon,* 262 U. S. 100 is not an authority to the contrary. In that case both the Constitutional amendment and the enactment of Congress clearly stated that the Prohibition Law should be effective

in "all territory subject to the jurisdiction" of the United States. Even with such words present in both the Constitution and the statute, two Justices registered a strong dissent against applying the law to foreign vessels while in our harbors. In the Jones Act there are no words whatever which require a full territorial application.

Conceding that Congress had the power, if it wished to exercise it, to make the Jones Act universally applicable throughout American territorial waters, it should not be held that Congress has exercised the power in violation of the well settled rule of international law and comity. Rather, it must be assumed that Congress had the doctrine of comity in mind when enacting the Jones Act, and chose not to disturb it.

## CONCLUSION.

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION SHOULD BE GRANTED.

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